



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

April 17, 2003

Ms. Pamela Smith
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2003-2607

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179403.

The Texas Department of Public Safety (the "department") received a request for DNA records and analyses involving two named individuals. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim.

Initially, we address the department's obligations under section 552.301 of the Government Code. Subsections 552.301(a) and (b) provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

You inform us that the department received this request for information on January 23, 2003. The tenth business day following this date was February 6, 2003. However, you did not send your request for a decision from this office until February 10, 2003. You do not allege that

the department was closed for any of the business days between January 23 and February 10. Thus, although we received your ruling request on February 10, you were already past the ten-day deadline.

When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. See Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No.319 (1982). To overcome this presumption, the governmental body must show a compelling interest to withhold the information. See Gov't Code § 552.302; *Hancock*, 797 S.W.2d at 381. Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No.150 at 2 (1977). As the presumption of openness can be overcome by a showing that information is confidential by law, we will consider your arguments under section 552.101.

You argue that, to the extent the department holds information responsive to the request, such information must be withheld from the requestor under section 552.101 in conjunction with section 411.153 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Section 411.153 provides in pertinent part that a “DNA record stored in the DNA database is confidential and is not subject to disclosure under the open records law.” Gov't Code § 411.153(a). “DNA record” means “the results of a forensic DNA analysis performed by a DNA laboratory and, if known, the name of the person who is the subject of the analysis.” *Id.* § 411.141(4).

Section 411.147 governs access to DNA database information and provides in part:

(c) The department may release a DNA sample, analysis, or record only:

- (1) to a criminal justice agency for law enforcement identification purposes;
- (2) for a judicial proceeding, if otherwise admissible under law;
- (3) for criminal defense purposes to a defendant, if related to the case in which the defendant is charged; or
- (4) if personally identifiable information is removed, for:
 - (A) a population statistics database;

(B) identification research and protocol development; or

(C) quality control.

Gov't Code § 411.147(c); *see also* 37 T.A.C. § 28.24 (regulation regarding release of information associated with DNA database).

In this instance, the request states that the information is “required by a [named] criminal defendant . . . for defense purposes in relation to a case for which he is charged.” The request goes on to say that the requested records pertain to two individuals who were present at the time of the incident for which the requestor was convicted. In addition, the request states that these two individuals pleaded guilty to sexual assault and that “[t]heir DNA profile is required for comparison with DNA samples found on exhibits seized by the police.” You do not refute any of the factual assertions made by the requestor or indicate that you have any reason to doubt their veracity. Instead, you state that “[t]he Department believes that a release under (c)(2) or (c)(3), which are the only exceptions that might apply to the instant request, requires either a court order or the agreement of the prosecutor, as the Department is not in a position to determine what is legally admissible in or ‘related to’ any particular case.”

You cite no authority for your interpretation of section 411.147's requirements, nor are we aware of any statute, rule, or case law that supports your position. You do not contend that section 411.147 is ambiguous. The primary goal in statutory interpretation is ascertaining and effectuating the Legislature's intent. *In re Canales*, 52 S.W.3d 698, 702 (Tex. 2001). In discerning the Legislature's intent, we begin with a statute's plain language because we assume that the Legislature tried to say what it meant and, thus, that its words are the surest guide to its intent. *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865-66 (Tex. 1999). “In applying the plain and common meaning of a statute, [one] may not by implication enlarge the meaning of any word in the statute beyond its ordinary meaning, especially when [one] can discern the legislative intent from a reasonable interpretation of the statute *as it is written*.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 324 (Tex. App.—Austin 2002, no pet.) (emphasis added) (citing *Sorokolit v. Rhodes*, 889 S.W.2d 239, 241 (Tex.1994)).

The plain language of subsection 411.147(c)(3) contains no language indicating that DNA records can be released for “criminal defense purposes” only if the prosecutor consents to such a release. We therefore disagree with the department's assertion that it may not release information pursuant to section 411.147(c)(3) without the consent of the prosecution.

Based on the representations made in the request, which are not in dispute, we conclude that this requestor clearly established under section 411.147(c)(3) that he is entitled to the

requested information to the extent that it exists, and you should release it.¹ As we are able to make this determination regarding section 411.147(c)(3), we need not consider whether the requestor met the requirements for access under section 411.147(c)(2).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

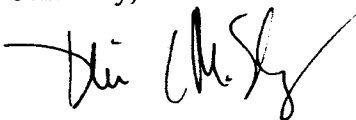
Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

¹For future reference, we note that the Public Information Act does not authorize a governmental body to seek a decision from this office when it reasonably believes that such information does not fall within an exception to disclosure. See Open Records Decision No. 665 (2000).

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Denis C. McElroy", with a stylized flourish at the end.

Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 179403

Enc. Submitted documents

c: Mr. Richard Bourke
Texas Defender Service
510 South Congress, Suite 307
Austin, Texas 78704
(w/o enclosures)